IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2801 of 2001

with

SPECIAL CIVIL APPLICATION No 8975 of 2000

with

SPECIAL CIVIL APPLICATION Nos.9030, 13130 to 13188 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL KAUSHIKKUMAR NANUBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2801 of 2001
MRS KETTY A MEHTA for Petitioner No. 1-8
MR KP RAVAL, AGP for Respondent No. 1
MR DC DAVE for Respondent No. 2-3
2. Special Civil Application No. 8975 of 2000
MR NK MAJMUDAR for Petitioner No. 1
MR KP RAVAL, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 18/08/2004

COMMON ORAL JUDGEMENT

1.1. Since the common question of law and facts is involved in this group of petitions, with the consent of the learned counsel appearing for the respective parties, the same are being finally disposed of by this common judgment.

1.2. In this group of matters, the common question is raised, whether a person holding the qualification can be considered for the post of "Vidhya Sahayak" or not.

1.3. By filing these petitions, the petitioners have challenged the Government circular whereby after issuance of the advertisement, the State Government by notification dated 1.8.2000 has directed that the trained teachers should not be considered for the post of "Vidhya Sahayak".

2.1. Mr.N.K.Majmudar, learned counsel for the petitioners in one of the petitions submitted that it is not open for the State Government, after issuance of the advertisement, to issue such notification and recruitment qualification cannot be made applicable retrospectively and even if it is made applicable, it should have been with prospective effect.

2.2. Mr.Majmudar has also contended that the respondent has wrongly interpreted the judgment of the Division Bench where the controversy was for the pay-scale of trained and untrained teachers and for the purpose of pay-scale of trained teachers, it was held that the persons holding B.Ed qualification may not be considered as trained teachers for primary school and, therefore, relying upon the judgment rendered by the Division Bench, the State Government has wrongly deprived

the persons from considering for job of PTC.

2.3. Mr.Majmudar submitted that the contention was raised that in view of the decision of the Full Bench rendered in Special Civil Application No.13363 of 2000 dated 3.12.2003, more particularly, para 7 by which the Full Bench has directed the State Government to consider B.Ed. graduates as trained teachers, and, therefore, the petitioners are entitled for appointment to the post of "Vidhya Sahayak". In para 7 of the said judgment, the Full Bench observed as under.:

"Accordingly, the Reference is answered as under:

" A person holding the degree of Graduate-B.Ed. is a "trained teacher" for Standards VI & VII, but is not a trained teacher for Standards I to V, with regard to his/her appointment as a primary teacher/Vidhya Sahayak in a Primary School."

2.4. Mr.Majmudar relied upon the decision of the Apex Court in the case of P.Mahendran and others. Vs. State of Karnataka and others, reported in AIR 1990 SC 405, wherein in para 5 the Apex Court has observed as under.:

"It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 does not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect. Since the amending Rule was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force. The amended Rule could not affect

the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter."

2.5. Mr.Majmudar has also relied upon the judgment of the Division Bench of this Court in the case of Kantibhai Parmabhai Vankar and ors. Vs. District Superintendent of Police, Sabarkantha and ors., reported in 1990(2) GLR 1259 where it has been held that it is not open to the respondents to cancel the select list in view of the higher qualification laid down for eligibility by amendment. The cancellation of select list in such circumstances held in valid and candidates included in the list held entitled to appointment if vacancies existed before the normal period expires. In this view of the matter, Mr.Majmudar submitted that since this Court has directed to keep the posts vacant and there are vacancies, therefore, the petitioners should be granted benefits of the existing Rules on the date of advertisement.

2.6. Mr.Majmudar also relied upon the decision of the Division Bench of this Court in the case of Gujarat State Civil Supplies Corporation Ltd. Vs. Dashrathlal L.Patel, reported in 1993(2) GLR 1676 where it has been held that subsequently rules amended with prospective effect in pursuance of agreement with the employees and changing the quota of direct recruits will not have retrospective effect and the same should be made prospective.

2.7. Mr.Majmudar has also placed reliance on the decision in the case of State of Rajasthan Vs. R.Dayal and others, reported in (1997) 10 SCC 419, wherein in para 8, the Apex Court has observed as under.:

"Therefore, it is not in dispute and cannot be disputed that while selecting officers, minimum requisite qualifications and experience for promotion specified in the relevant column, should be taken into consideration against vacancies existing as on 1st April of the year of selection. But since the Rules came to be amended and the amendment became effective with immediate effect and clause (11-B) of Rule 24-A indicates that options have been given to the Government or the appointing Authority, as the

> case may be, to revise the select list as existing as per the law as on the date of the appointment or as may be directed by a competent court, selection is required to be made by the concerned DPC. An appointment made, after selection as per the procedure, to the vacancies existing prior to the amendment, is valid. But the question is whether selection would be made, in the case of appointment to the vacancies which admittedly arose after the amendment of the Rules came into force, according to the amended Rules or in terms of Rule 9 read with Rules 23 and 24-A, as mentioned hereinbefore. This Court has considered the similar question in para 9 of the judgment above-cited. This Court has specifically laid that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this Court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in in accordance with the law existing as on the date when the vacancies arose. Undoubtedly, the selection came to be made prior to the amendment of the Rules in accordance with law then existing since the anticipated vacancies also must have been taken into consideration in the light of Rule 9 of the Rules. But after the amended Rules came into force, necessarily the amended Rules would be required to be applied for and given effect to. But, unfortunately, that has not been done in the present case. The two courses are open to the Government or the appointing authority viz. either to make temporary promotions for the ensuing financial year until the DPC meets or in exercise of the power under Rule 24-A(11-B), they can revise the panel already prepared in accordance with the Rules and make appointments in accordance therewith."

3.1. Mr.K.P.Raval, learned AGP appearing for the State Government in all these matters has placed reliance upon the decision in the case of The State of M.P. & Ors. Vs. Raghuveer Singh Yadav & Ors, reported in JT 1994 (5) SC 235, wherein the Apex Court in paras 5 and 6 has observed as under.:

"5. It is not in dispute that Statutory Rules have been made introducing Degree in Science or Engineering or Diploma in Technology as qualifications for recruitment to the posts of Inspector of Weights and Measures. It is settled law that the State has got power to prescribe qualifications for recruitment. Here is a case that pursuant to Amended Rules, the Government has withdrawn the earlier notification and wants to proceed with the recruitment afresh. It is not a case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered of their claims according to the rules then in vogue. The amended rules have only prospective operation. The Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously, no candidate acquired any vested right against the State. Therefore, the State is entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended rules.

6. The ratio in P.Mahendran & Ors. V/s State of Karnataka & Ors. (AIR 1990 SC 405) has no application to the facts in this case. In that case, for the posts of Motor Vehicles Inspector, apart from the qualifications prescribed, they issued additional qualifications and selection was sought to be made on the basis of additional qualifications. It was held that since recruitment was sought to be made on the basis of the qualifications prescribed, the additional qualifications prescribed thereafter have no retrospective effect to the recruitment already set in motion. Under those circumstances, additional qualifications were directed not to be taken into account for considering the claims of the candidates on the basis of the original advertisement. The ratio therein is clearly inapplicable to the facts in the case."

3.2. Mr.Munshaw also submitted that in view of the judgment of the Division Bench, the respondent acted upon the law declared by this Court and, therefore, the action of the respondent should be upheld and no interference is called for.

4.1. In this view of the matter, it is very clear that it is not open to the respondent to change the criteria of selection in the midst of the selection process. The case of the petitioners is required to be accepted and they should have been considered by the respondents as if they were eligible for the post of "Vidhya Sahayak". It is also clear that the authority should have considered the qualification as on the date of advertisement. It also appears to me that it is open to the State Government to cancel the advertisement, but they cannot change the criteria after issuance of the advertisement.

4.2. Considering the facts of the case, as well as considering the decisions of the Apex Court referred to above, it is clear that the petitioners were eligible from the date of advertisement and the respondents should have considered them for the post of "Vidhya Sahayak". However, change of Rules during the selection process is not permissible, and, therefore, the respondents will consider the case of the petitioners, if they are otherwise eligible on merits, they should be appointed on the post of "Vidhya Sahayak". It is made clear that upper age factor will not come in the way of the petitioners while considering the case of the petitioners by the respondents.

4.3. This exercise will be done and completed within one month from the date of receipt of the writ of this order. It is clarified that the persons who are selected will be given seniority from the date on which other persons were appointed pursuant to the advertisement, but they will not be entitled for salary from that date.

5. In the result, these petitions are allowed. Rule is made absolute in each of the petitions.

(K.S.Jhaveri,J)

(pathan)